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No. 02-1290

In the Supreme Court of the United States

UNITED STATES POSTAL SERVICE, PETITIONER

v.

FLAMINGO INDUSTRIES (U.S.A.) LTD. AND ARTHUR WAH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

		Page
1.	The Ninth Circuit's decision conflicts with *United States* v. *Cooper* and lower court decisions holding that agencies and instrumentalities of the United States are not "persons" under the anti-trust laws	2
2.	The Ninth Circuit's decision conflicts with *FDIC* v. *Meyer* and with appellate decisions holding that 39 U.S.C. 401(1) does not create substantive liability on the part of the Postal Service	5
3.	The impact of the Ninth Circuit's decision on the Postal Service's operations warrants this Court's review	8

TABLE OF AUTHORITIES

Cases:

Baker v. *Runyon*, 114 F.3d 668 (7th Cir. 1997), cert. denied, 525 U.S. 929 (1998)	7-8
FDIC v. *Meyer*, 510 U.S. 471 (1994)	1, 5, 6
Federal Express Corp. v. *United States Postal Serv.*, 151 F.3d 536 (6th Cir. 1998)	7
Federal Hous. Admin. v. *Burr*, 309 U.S. 242 (1940)	7
Franchise Tax Bd. v. *United States Postal Serv.*, 467 U.S. 512 (1984)	6, 7
Georgia v. *Evans*, 316 U.S. 159 (1942)	3
Global Mail Ltd. v. *United States Postal Serv.*, 142 F.3d 208 (4th Cir. 1998)	7
Jinks v. *Richland County*, No. 02-258 (Apr. 22, 2003)	3
Jet Courier Servs., Inc. v. *Federal Reserve Bank*, 713 F.2d 1221 (1983)	5
Loeffler v. *Frank*, 486 U.S. 549 (1988)	6, 7
Pfizer Inc. v. *Government of India*, 434 U.S. 308 (1978)	3

Cases—Continued: Page

Robinson v. *Runyon*, 149 F.3d 507 (6th Cir. 1998) 7
Sea-Land Serv., Inc. v. *Alaska R.R.*, 659 F.2d 243 (D.C. Cir. 1981), cert. denied, 455 U.S. 919 (1982) ... 1, 4, 5, 9
United States v. *Cooper Corp.*, 312 U.S. 600 (1941) 1, 2, 3
United States v. *Mitchell*, 463 U.S. 206 (1983) 5
United States v. *Q Int'l Courier, Inc.*, 131 F.3d 770 (8th Cir. 1997) 7
United States Postal Service v. *Council of Greenburgh Civil Ass'ns*, 453 U.S. 114 (1981) 4, 6
Young, In re, 869 F.2d 158 (2d Cir. 1989) 8

Statutes:

Act of Sept. 22, 1789, ch. 16, 1 Stat. 70 3
Act of June 8, 1872, ch. 335, 17 Stat. 283 3
Administrative Procedure Act, 5 U.S.C. 702 4
Lanham Act, 15 U.S.C. 1127 (1994) 7
Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 3
39 U.S.C. 101(a) 3
39 U.S.C. 201 3
39 U.S.C. 202 3
39 U.S.C. 205(d) 3
39 U.S.C. 401(1) 4, 5, 6, 8
39 U.S.C. 401(9) 3
39 U.S.C. 401(10) 9
39 U.S.C. 407 4
39 U.S.C. 410 3
39 U.S.C. 1001 3
39 U.S.C. 1011 3
39 U.S.C. 2006(c) 4
Sherman Act, 15 U.S.C. 7 2
12 U.S.C. 341 5
28 U.S.C. 2402 8
42 U.S.C. 1981a(b)(1) 8

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The Ninth Circuit's holding that the Postal Service is amenable to suit under the antitrust laws violates two established principles of this Court's jurisprudence and conflicts with the decisions of lower courts. First, the court of appeals' decision conflicts with *United States* v. *Cooper Corp.*, 312 U.S. 600 (1941), and an unbroken line of lower court precedent beginning with *Sea-Land Service, Inc.* v. *Alaska Railroad*, 659 F.2d 243, 245 (D.C. Cir. 1981) (R.B. Ginsburg, J.), cert. denied, 455 U.S. 919 (1982), holding that the United States and its agencies and instrumentalities are not "persons" subject to liability under the antitrust laws. Second, the court of appeals' decision conflicts with the holding of *FDIC* v. *Meyer*, 510 U.S. 471 (1994), that a waiver of sovereign immunity is insufficient to impose substantive liability on a federal agency, as well as with the decisions of lower courts that have specifically held that the Postal Service's sue-and-be-sued clause is not basis for creating liability against the Postal Service. The court of appeals' unprecedented decision in this case will have an immediate and detrimental impact on the ongoing operations of the Postal Service. Review by this Court is therefore warranted.

1. The Ninth Circuit's Decision Conflicts With *United States* v. *Cooper* And Lower Court Decisions Holding That Agencies And Instrumentalities Of The United States Are Not "Persons" Under The Antitrust Laws

a. This Court held in *Cooper*, 312 U.S. at 606-608, that the term "person" in the Sherman Act, 15 U.S.C. 7, does not include the United States. Respondents do not dispute that the holding in *Cooper* applies with equal force to agencies and instrumentalities of the United States (see Pet. 6-7) or that the Postal Service is a quintessential agency or instrumentality of the United States (see Pet. 7-9). Rather, respondents argue that a "person" includes any federal agency and instrumentality for which Congress has waived sovereign immunity, because such an entity "can 'sue and be sued' just like any 'corporation[] and association[]'" that is expressly covered by the Sherman Act, and therefore "should be considered a corporation or association 'existing under or authorized by the laws of . . . the United States.'" Br. in Opp. 3-4 (quoting 15 U.S.C. 7). There are two fundamental flaws in this reasoning.

First, the Court's holding in *Cooper* was unqualified. The Court held that the United States is not a "person" entitled to sue for treble damages when it acts as a purchaser because, *inter alia*, "person" has the same meaning for the United States whether referring to a Sherman Act plaintiff or defendant, and Congress did not intend that the United States "would be liable to suit for treble damages" under the Act. 312 U.S. at 606. Indeed, respondents' attempt to limit *Cooper* to instances in which the United States has not consented *to be sued* is disconnected from the Court's specific holding in *Cooper* that the United States may not *bring suit* as a Sherman Act plaintiff. As the Court recognized, "[t]he United States is a juristic person in the sense that it has capacity to sue." *Id.* at 604. The Court nonetheless held that Congress did not intend the United States to be included as a "person" that is entitled to sue for damages

under the antitrust laws. *Id.* at 606. It follows that the United States (or one of its agencies or instrumentalities) likewise is not a "person" that is subject to a suit for treble damages under the antitrust laws even if it has the general capacity to *be* sued.*

Second, contrary to respondents' assertion, the Postal Service is not a "corporation," "association," or other private entity. See Pet. 7-8. Rather, postal services have always been carried out by the Executive Branch of the United States Government. Act of Sept. 22, 1789, ch. 16, 1 Stat. 70; Act of June 8, 1872, ch. 335, 17 Stat. 283. Congress carried forward that tradition in the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719, by creating the Postal Service as "an independent establishment of the executive branch of the Government of the United States." 39 U.S.C. 201. To ensure that postal services would be "provided to the people by the Government of the United States," 39 U.S.C. 101(a), Congress mandated that the Postal Service be comprised of governmental officers and employees, 39 U.S.C. 202, 205(d), 410, 1001, 1011, and granted the Postal Service uniquely sovereign powers, including the right of eminent domain in the name of the United States, 39 U.S.C. 401(9), the right to negotiate international postal treaties and conventions,

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* Respondents err in attempting (Br. in Opp. 4-5) to draw support from this Court's decisions that have recognized that the term "person" may include governmental bodies *other than the United States*, such as foreign countries, States, and municipalities. In *Pfizer Inc.* v. *Government of India*, 434 U.S. 308 (1978), and *Georgia* v. *Evans*, 316 U.S. 159 (1942), the Court held only that a foreign nation and a State may sue *as a plaintiff*, not that they are subject to the substantive standards and treble-damage provisions of the antitrust laws as defendants, and those decisions reaffirm *Cooper*'s holding that the United States is not a "person" under the antitrust laws, 434 U.S. at 316-317; 316 U.S. at 161-162. Cases involving municipalities are even further afield, for municipalities do not have the same sovereign status as States. See, *e.g.*, *Jinks* v. *Richland County*, No. 02-258 (Apr. 22, 2003), slip op. 9-10.

39 U.S.C. 407, and the right to borrow on the United States' full faith and credit, 39 U.S.C. 2006(c).

Nothing in Congress's waiver of sovereign immunity in the sue-and-be-sued clause of 39 U.S.C. 401(1) alters the fundamental sovereign character of the Postal Service. Indeed, the waiver itself presupposes that the Postal Service *is* part of the sovereign. Respondents' position is thus contrary to this country's long history of treating postal services as "a sovereign function" and "a sovereign necessity," *United States Postal Service* v. *Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 121 (1981), as well as the numerous current provisions in Title 39 that explicitly refer to and treat the Postal Service as an arm of the United States.

b. The Ninth Circuit's decision represents the first appellate decision to hold that a federal agency or instrumentality is a "person" within the meaning of the antitrust laws. That decision departs from many lower courts decisions that have addressed the issue and uniformly held that agencies and instrumentalities of the United States are not "persons" subject to the substantive restrictions and treble damage provisions of the antitrust laws. Pet. 9-11.

Respondents argue (Br. in Opp. 4) that none of those decisions explicitly addressed whether the Sherman Act extends to a federal agency or instrumentality that Congress has determined can sue and be sued. Contrary to respondents' assertion, however, the D.C. Circuit's seminal decision in *Sea-Land Service* explicitly *did* address the issue of whether the antitrust laws apply to United States agencies and instrumentalities where Congress has waived sovereign immunity. The court recognized that the Administrative Procedure Act, 5 U.S.C. 702, had "eliminate[d] the defense of sovereign immunity in actions for specific, nonmonetary relief," and the court accordingly observed that, "[w]ere sovereign immunity our sole concern, * * * we would hold the named United States agencies and officials answerable in this action." 659 F.2d at 244-245. The court nonetheless held

that the antitrust laws "do[] not expose United States instrumentalities to liability." *Id.* at 245.

Furthermore, in *Jet Courier Services, Inc.* v. *Federal Reserve Bank*, 713 F.2d 1221, 1228 (1983), the Sixth Circuit held that the antitrust laws do not apply to a Federal Reserve Bank, which may "sue and be sued" under 12 U.S.C. 341. Although the Sixth Circuit did not discuss Congress's waiver of the Federal Reserve Bank's sovereign immunity in 12 U.S.C. 341, the Ninth Circuit's holding cannot be reconciled with the result reached in *Jet Courier*.

2. The Ninth Circuit's Decision Conflicts With *FDIC* v. *Meyer* And With Appellate Decisions Holding That 39 U.S.C. 401(1) Does Not Create Substantive Liability On The Part Of The Postal Service

a. Respondents' sole basis for contending that the antitrust laws apply to the Postal Service is the sue-and-be-sued clause of 39 U.S.C. 401(1), which Congress passed as part of the Postal Reorganization Act. Respondents thus apparently argue (Br. in Opp. 8-9) that Section 401(1) rendered the Postal Service subject to all substantive laws previously inapplicable to the United States and its agencies and instrumentalities, unless those laws expressly directed otherwise. That reasoning mirrors the court of appeals' decision. Pet. App. 4a, 8a, 10a, 13a.

That analysis flatly contradicts the holding of *FDIC* v. *Meyer*, 510 U.S. 471, 484 (1994), because it "conflates" the issue of whether Congress has waived a federal entity's sovereign immunity with the "analytically distinct" (quoting *United States* v. *Mitchell*, 463 U.S. 206, 218 (1983)) issue of whether Congress intended to impose liability on the United States and its agencies and instrumentalities. Pet. 12-14. Under *FDIC* v. *Meyer*, a waiver of sovereign immunity does not create a cause of action against federal entities, and courts accordingly must look elsewhere for an independent

source of substantive law that gives the claimant an avenue for relief. Pet. 12-14.

The sue-and-be-sued clause in 39 U.S.C. 401(1) removes the defense of sovereign immunity with respect to statutes that *otherwise* would impose substantive liability on federal agencies and instrumentalities; the clause, however, does not "strip[] the Postal Service of its sovereign status." Pet. App. 13a. In light of the l ng-standing tradition that postal services are an essential "sovereign function," *Council of Greenburgh Civic Ass'ns*, 453 U.S. at 121, as well as the current statutory provisions of Title 39 that demonstrate the Postal Service's federal sovereign character, the sue-and-be-sued clause in Section 401(1) plainly cannot be construed to create new substantive liability under the antitrust laws.

Respondents err in relying (Br. in Opp. 6-10) on the observation in *Franchise Tax Board* v. *United States Postal Service*, 467 U.S. 512, 519-520 (1984), and other lower court decisions, that Congress in 1970 launched the Postal Service into the commercial world and rendered it more like other businesses. That observation says nothing about whether another federal statute, such as the Sherman Act, independently imposes substantive liability on an agency or instrumentality of the United States. This Court's subsequent decision in *Meyer*, 510 U.S. at 484, specifically requires such an independent source of liability, and makes clear that substantive liability cannot be inferred solely from Congress's waiver of sovereign immunity in a ue-and-be-sued clause.

Moreover, as explained in the petition (at 15-16), the Court's earlier decisions in *Franchise Tax Board* and in *Loeffler* v. *Frank*, 486 U.S. 549 (1988), concerned only the scope of the waiver of sovereign immunity in 39 U.S.C. 401(1). Neither decision suggested that the sue-and-be-sued clause was itself a source of liability against the Postal Service. To the contrary, in *Loeffler*, the Court recognized that the liability of the Postal Service under Title VII derives not

from the sue-and-be-sued clause but from an express provision in Title VII making that statute applicable to federal agencies. 486 U.S. at 563. And in *Franchise Tax Board*, the Postal Service was merely a stakeholder of the employees' wages that were subject to garnishment, so that no new substantive liability was imposed on the Postal Service. 467 U.S. at 516. The Court simply held that a sue-and-be-sued clause, which under *Federal Housing Administration* v. *Burr*, 309 U.S. 242 (1940), subjects the federal agency concerned to garnishment orders issued by a state court, likewise subjects the federal agency to garnishment orders issued by a state administrative agency. See 467 U.S. at 517-519, 521-525.

Respondents also rely (Br. in Opp. 7-10) on lower court holdings that the Postal Service was a "person" amenable to suit under the Lanham Act at a time when that term extended to an "organization capable of suing and being sued." 15 U.S.C. 1127 (1994). *Federal Express Corp.* v. *United States Postal Service*, 151 F.3d 536 (6th Cir. 1998); *Global Mail Ltd.* v. *United States Postal Service*, 142 F.3d 208, 216-217 (4th Cir. 1998); *United States* v. *Q Int'l Courier, Inc.*, 131 F.3d 770, 775 (8th Cir. 1997). Those decisions are inapposite, because the language of the Lanham Act at the time imposed liability on an organization that had the capacity to sue and be sued. By contrast, as recognized by *Cooper* and *Sea-Land*, the Sherman Act categorically excludes the United States and its agencies and instrumentalities from the coverage of the antitrust laws, whether or not they have the capacity to sue or be sued. Pp. 2-5, *supra*.

b. Respondents do not dispute that the Ninth Circuit's holding conflicts with decisions of other courts of appeals that have held that the "sue-and-be-sued" clause does not provide an independent source of liability against the Postal Service. Pet. 15-17. The Sixth Circuit in *Robinson* v. *Runyon*, 149 F.3d 507, 516-517 (1998), and the Seventh Circuit in *Baker* v. *Runyon*, 114 F.3d 668, 670-671 (1997), cert.

denied, 525 U.S. 929 (1998), have held that the waiver of sovereign immunity in 39 U.S.C. 401(1) does not render the Postal Service liable for punitive damages under Title VII because such awards are not applicable to any "government [or] government agency" under 42 U.S.C. 1981a(b)(1). Similarly, the Second Circuit in *In re Young*, 869 F.2d 158, 159 (1989) (per curiam), held that the Postal Service's sue-and-be-sued clause does not render it amenable to trial by jury, because 28 U.S.C. 2402 prohibits trial by jury against "the United States," because "the waiver does not change the fact that the party being sued is still the federal government."

Those decisions hold that the Postal Service's amenability to suit under 39 U.S.C. 401(1) does not deprive the Postal Service of its governmental character and does not independently create a substantive right against the Postal Service. Those decisions cannot be reconciled with the Ninth Circuit's holding in this case that the Postal Service is subject to substantive liability under the antitrust laws solely by virtue of 39 U.S.C. 401(1).

3. The Impact Of The Ninth Circuit's Decision On The Postal Service's Operations Warrants This Court's Review

The Postal Service is a massive federal entity that conducts a wide variety of operations, employs 770,000 federal employees, receives annual revenues of $66 billion, and delivers 200 billion pieces of mail each year. The Ninth Circuit's unprecedented holding that the Postal Service is a "person" that may be liable for treble damages and attorneys' fees under the antitrust laws immediately threatens to impose substantial burdens and costs on the ongoing operations of the Postal Service that Congress never intended. See Pet. 17-19.

Respondents argue (Br. in Opp. 11) that the detrimental impact from the Ninth Circuit's decision would be lessened by the court of appeals' recognition of a "conduct-based immunity," under which the Postal Service "cannot be sued for carrying out its legislative mandate" but can be sued for "acts contrary to legislative will that are anti-competitive." But Congress never intended federal agencies and instrumentalities such as the Postal Service to be liable to suit under the antitrust laws *at all*. Moreover, all acts of the Postal Service presumptively "carry[] out its legislative mandate" (Br. in Opp. 11), because Congress broadly authorized the Postal Service to take all actions "incidental, necessary, or appropriate to the carrying on of its functions or the exercise of its specific powers." 39 U.S.C. 401(10); see Pet. 19-20. Any configuration of the Ninth Circuit's newly minted "conduct-based immunity" thus would create an entirely unnecessary and costly regime that would force the Postal Service to undergo future litigation to determine the contours of such immunity and to show in a particular case that the conduct being challenged was "taken at the command of Congress." Pet. App. 13a.

Respondents also argue (Br. in Opp. 11) that subjecting the Postal Service to liability under the antitrust laws would serve the congressional purpose in the Postal Reorganization Act to make the Postal Service more competitive. In passing *the antitrust laws*, however, Congress made the fundamental policy decision categorically to exclude the United States and its agencies and instrumentalities from suit under the antitrust laws. See *Sea-Land Service*, 659 F.2d at 247 (concluding that Sherman Act did not apply to Alaska Railroad and supervising United States agencies even though such entities "operate[] alongside private companies"). In addition, respondents' position would permit courts, rather than Congress, to determine when and whether the Postal Service's operations are anti-competitive, and if so, whether its operations were not sufficiently authorized by Congress such that the Postal Service should be liable for the severe sanctions imposed by the antitrust laws. It is hard to imagine a scheme more at odds with congressional intent to

establish the Postal Service to perform a governmental function as a part of the Executive Branch of the United States Government.

At bottom, the Ninth Circuit's "conduct-based immunity" defense, whatever its contours, provides little comfort to the Postal Service, as this case demonstrates. Under the Ninth Circuit's decision, the Postal Service will have to undergo potentially expensive and time-consuming litigation to determine whether the antitrust laws apply to respondents' allegation that the Postal Service "conspire[d] to prevent competition in production of mail sacks" (Br. in Opp. 11) when the Postal Service conducted the routine government procurement at issue in this case.

For similar reasons, the need for this Court to review the Ninth Circuit's decision is not diminished by the fact that the Postal Service "may well prevail at trial" or may petition this Court after any imposition of injunctive relief or a treble damages award. Br. in Opp. 11-12. The court of appeals' holding that the Postal Service is amenable to suit under the antitrust laws imposes immediate and direct costs and burdens associated with defending suits challenging the Postal Service's operations as anti-competitive and with conducting its extensive operations under the threat of treble-damages liability. Particularly given the breadth and magnitude of the Postal Service's operations, and the conflict the Ninth Circuit's decision creates with decisions of this Court and other courts of appeals, the Ninth Circuit's holding warrants this Court's review.

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For the reasons stated above, and in the petition for a writ of certiorari, it is respectfully submitted that the petition should be granted.

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